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Department of Water Resources
Adjudication Bureau

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re: SRBA

Case No. 39576

Subcase Nos. A36-04260B, A36-
00048A, A36-00049, A36-02169,
A36-00039D, A36-00048A

CRANNEY BROS.' PRE-
HEARING MEMORANDUM

Cranney Bros., ("Cranney") hereby submits its Pre-Hearing Memorandum ("Memorandum") supporting Cranney's Motions to File Late Responses ("Motions") in the above-referenced subcases ("Subcases"). In this Memorandum, Cranney demonstrates that it relied upon the presence of the Idaho Department of Water Resources and the Director as parties ("Director") in the SRBA when Cranney did not file responses in the Subcases, that Cranney has an interest that will be impacted by the outcome of the Subcases, and that Cranney has stated a meritorious position which justifies being admitted as a party to the Subcases.

I. PROCEDURAL HISTORY

On June 23, 1995, the Idaho Supreme Court ruled in Basinwide Issue 3 that the Director no longer is a party in the SRBA. On July 28, 1995, Judge Hurlbutt issued an order allowing until August 18, 1995 for parties to the SRBA to seek to file late objections or responses to claims in the three test basins. In his order, Judge Hurlbutt held that:

Because the Director was previously a party to the SRBA and to all Subcases, some parties assumed that IDWR would participate and litigate in defense of the Director's Report. Based on the pleadings and party status of IDWR prior to the 1994 amendments to the SRBA statutes, some parties decided not to participate in certain Subcases, choosing instead to rely on the Director's Report and IDWR's defense of its pleading.

The Director's Report no longer is a pleading, and IDWR and the Director are no longer a party. Those parties who opted to rely on IDWR to litigate and advocate in favor of the Director's Report are now unable to do so. *Therefore, it is necessary to provide a mechanism for parties to participate in Subcases where participation is required due to the removal of the Director and IDWR as a party and the change in status of the Director's Report as a pleading. . .*

Decisions on *Motions to File Late Objections* and *Motions to File Late Responses* shall be decided by the Special Master to whom the Subcase has been referred. The Special Master shall require good cause and meritorious position when reviewing these *Motions*. Parties must *allege* facts, which if true, would constitute a meritorious position.

Order at 1-2 (emphasis added). Pursuant to the Court's Order, Cranney timely filed its Motions to File Late Responses to objections in the five Subcases involving the claims of McFaddan, Walmsley and Brailsford.

As grounds for its late responses, Cranney asserted, among other things, that

1. Cranney holds claims to ground water rights filed in the SRBA.
2. Cranney has an interest in assuring that other water rights claimed in the SRBA be decreed consistent with basic principles of water law,

including among others, the principle of beneficial use.

3. Cranney relied upon the Director's presence as a party in the Subcases to defend the Director's report, and therefore had not filed objections or responses earlier.
4. Cranney does not intend to raise additional issues beyond those already presented by the Director's Report and by the Claimants' Objections thereto.

Cranney submitted proposed Responses to the subject Objections, which generally support the Director's Responses to Objections, and the Director's recommendations of the various rights as contained in the Director's Report for Basin 36.

At approximately 5:00 pm on Friday, August 18, 1995, Cranney was served with the Claimants' first deposition notice which sought to depose Cranney on the following Thursday, August 24th. Judge Hurlbutt granted protection, ruling that discovery could be had only in a Subcase.

On September 1, 1995, Special Master Dolan set a November 22, 1995 hearing date for Cranney's Motions. Nearly two months later, on October 23, 1995, the Claimants sent Cranney a second deposition notice for November 3, 1995. The court denied Cranney's motion to limit discovery to the issues pending before the Court on Cranney's Motion to File Late Responses. Much of the approximately six-hour deposition was directed towards the location of Cranney's sprinklers, the size and make of Cranney's sprinkler heads, the water pressures used and the extent to which Mike Cranney personally had inspected the Claimants' property and water diversion facilities prior to Cranney's filing of its Motions.

To the extent the deposition covered matters relevant to the question of whether the late responses should be allowed, Mike Cranney's testimony corroborated

the allegations contained in Cranney's Motions. Mike Cranney stated that:

1. Cranney has claims filed in the SRBA. See Exhibit 1 to Mike Cranney Deposition attached to Affidavit of Michael C. Creamer.

2. Mr. Cranney explained that the Department explained to him that the Department would examine uses under each claim, make recommendations based upon such examination, and would "represent" and "run interference" for other parties, like Cranney, by defending the Director's recommendations before the Court. See Pg. 14, l. 11 to Pg. 15, l. 17; Pg. 14, l. 17 to Pg. 17, l. 7, Mike Cranney Deposition attached to Affidavit of Michael C. Creamer. When the Director was removed as a party, Cranney was put at risk that overstated water rights, such as Claimants, would proceed unopposed.

3. When the period for filing late objections and responses expired, Cranney understood that the Department was a party, that it would recommend the rights based upon its findings of actual beneficial use, and that it would defend its findings. See Pg. 31, l. 22 to Pg. 32, l. 8; Pg. 111, l. 17 to Pg. 112, l. 2 to Mike Cranney Deposition attached to Affidavit of Michael C. Creamer.

4. Cranney understands the Department investigated the Claimants' claims and made the recommendations contained in the Director's Report for Basin 36 based upon such investigations, See Pg. 158, l. 5 to Pg. 162, l. 19, to Mike Cranney Deposition, attached to Affidavit of Michael C. Creamer; and

5. Cranney has relied on the Department's investigations and recommendations, and Cranney's own evaluation of those investigations and recommendations, and matters contained in the Director's files, as the basis for

Cranney's Motions. See Pg. 42, l. 3 to l. 15, to Mike Cranney Deposition, attached to Affidavit of Michael C. Creamer.

II. POINTS AND AUTHORITIES

A. Cranney's Reliance on the Department's Role as Party Defending its Recommendations Satisfies the "Good Cause" Requirement for Filing a Late Response.

Judge Hurlbutt's July 28, 1995 Order directs that motions to file late responses or objections should be determined under criteria similar to those applied to Rule 55(c) motions, which require "good cause" for setting aside an entry of default. However, the Court's July 28th Order also implies that good faith reliance on the Director's status as a party and the Director's pleadings constitutes "good cause" within the meaning of Rule 55(c). Hence, the Court's statement that "it is necessary to provide a mechanism for parties to participate in subcases where participation is required due to the removal of the Director as a party and the change in the status of the Director's Report as a pleading." Order at 2.

Cranney has relied upon the Department's presence in these Subcases, and upon its actively litigating its responses to the objections, and therefore has not, until the termination of its party status, had a need to become involved in Basin 36 objections. Michael Cranney testified at his deposition that he understood that the Director would "represent" and "run interference" for Cranney in supporting the Director's recommendations. See Pg. 14, l. 11 to Pg. 15, l. 17; Pg. 14, l. 17 to Pg. 17, l. 7, Mike Cranney Deposition attached to Affidavit of Michael C. Creamer.

The Director's dismissal from the SRBA was not something that reasonably could be expected by anyone before the time expired for filing objections and

responses in Basin 36. The 1994 amendments removing the Director as a party came after the deadline for filing objections or responses to the Director's Report for Basin 36, and substantially altered the procedures. Before the Department was removed as a party, Cranney had good reason to rely on the agency to advocate for an appropriate duty of water, a fair and reasonable season of use, and other water right elements that do not countenance inflated claims and otherwise protect all claimants. Now, procedural changes require Cranney to protect himself. Basic fairness requires that Cranney at least be allowed to file late response and participate as a full party. Moreover, due process requires that Cranney's reliance on the pre-amendment conditions be deemed sufficient justification for being admitted to the Subcases now. *See Crane v. Hahlo*, 258 U.S. 142 (1922) cited in *State v. Griffith*, 97 Idaho 52, 539 P.2d 604 (1975)(due process requires that procedural changes leave parties with a "substantial and efficient remedy"). Cranney has been affected by a procedural change. Unless he is allowed into this case, he will have no remedy. *See also Joint Motions for Amendment of Administrative Order 1 and for Expedited Hearing* filed with the Court on July 14, 1995.

Cranney was justified in relying on the Department to represent him. Furthermore, Basins 34, 36 and 54 are the "test basins" for working out many of the potential procedural problems inherent in a basinwide general stream adjudication. Such a problem has come to the forefront here, and the Court has appropriately crafted a remedy which allows parties such as Cranney, who reasonably relied on the Director defending its pleadings, to file late responses now.

There is absolutely no reason to believe that Cranney's reliance on the Director

continuing to be a party and defender of the Director's Report was unreasonable or in bad faith. Cranney has stated "good cause" for relying on the Director's status as a party, and for not filing a response to the Claimants' claims in Basin 36 by the original deadline. Cranney's Motion should be granted.

B. Cranney has Stated a Meritorious Position.

Broadly stated, Cranney's position in these Subcases, as stated in its proposed response, is that the quantity of the Claimants' water rights that can be decreed must be limited to the amount that is beneficially used, observing an appropriate duty of water, and that the elements of the Claimants' water rights, including the place of use, period of use, and quantity, have been greatly overstated. Cranney's proposed response is that the Director's recommendations correctly state the elements of the Claimants' water rights and the way they should be decreed by the Court. This is a critical issue to Cranney. Unless he is allowed into these Subcases to defend the Director's report, who will?

For example, the McFaddan Claims, numbers 36-00049 and 36-00048A, together assert a diversion rate of over five and one-half miners inches per irrigated acre. The Walmsley Claim, number 36-00039, asserts a diversion rate of six and one-half inches per irrigated acre, and the Brailsford Claim, number 36-4260B asserts a diversion rate of nearly 2.6 inches per irrigated acre. Each of these Claims assert a year-round period of use for irrigation. On their face, the Claims defy both common experience, and the statutory limit of one miner's inch (0.02 cfs) per acre. Claims of this magnitude are prima facie unreasonable. Moreover, the Claims are contrary to the findings made by the Director after investigation. If the Director is correct, but

the court decrees the water rights as claimed by the Claimants, other junior claimants such as Cranney may be held liable to supply the inflated quantities of water, year-round, to the Claimants and others similarly situated in the Hagerman Valley. Cranney's position that it such a result must not be permitted certainly has merit. See Pg. 31, l. 9 to l. 21; Pg. 33, l. 2 to Pg. 34, l. 5 to Mike Cranney Deposition attached to Affidavit of Michael C. Creamer. Examining the face of Claimants' claims itself provides more than enough "good cause" to support a meritorious position.

Based upon questions posed to Michael Cranney at his deposition, Cranney presumes that the Claimants will argue that Cranney's position is not meritorious because Cranney did not personally investigate the Claimants' actual use of their water. This argument must fail. Cranney is not a party to these Subcases. Therefore, Cranney has not had even the opportunity to conduct any discovery, which would provide the detailed, first-hand knowledge of the Claimants' water systems and use that the Claimants apparently believe is necessary to file a response to their objections.¹ Cranney has in good faith placed his reliance upon the Director's recommendations, which, although they recommend in excess of one inch per acre, are based upon the Director's investigation of the Claimants' claims. Cranney's reliance upon the recommendations of the court's own expert and advisor satisfies any requirement of reasonable inquiry into the claims prior to Cranney submitting its Motion, and the requirement that Cranney have a meritorious position.

¹Indeed, it would not be possible for Cranney to have acquired such first-hand knowledge since Cranney is not a party to the Subcases. For example, the Court has denied any discovery to other parties in the SRBA main case seeking to make late responses in these and other Subcases. See *Protective Order*, issued November 15, 1995 in Subcase Nos. 36-00021B, 36-00048A, 36-00049, 36-00051A, 36-10283A and 36-15168.

What Cranney does have personal knowledge of, being in the irrigated farming business in southern Idaho itself, is the reasonable range of quantities of water necessary to raise crops. Cranney has concluded, and therefore has alleged in its pleadings, that the rates and volumes of diversion claimed by the Claimants falls outside that reasonable range of quantities that can be put to beneficial use. Cranney also has relied on the Department's investigation, and resulting recommendations as a basis for its Motions. Mike Cranney testified at his deposition that he believed the Department and its personnel to be the experts on the subject of water use for the uses claimed by the Claimants. *See* Pg. 41, l. 10 to Pg. 42, l. 15; Pg. 58, l. 7 to l. 13 to Mike Cranney Deposition attached to Affidavit of Michael C. Creamer.

The Director has always been held to have special expertise in the area of determining the nature and extent of water rights and beneficial use of water. *See* Idaho Code, Title 42, Chapter 2. The original SRBA statutes themselves recognized this expertise, and required the Director to determine the facts surrounding SRBA claims. Idaho Code § 42-1410 provides that

(1) Upon entry of the court's order commencing a general adjudication, or as required in sections 42-1404 or 42-1405, Idaho Code, the director shall commence an examination of the water system, the canals and ditches and other works, and the uses being made of water diverted from the water system. The examination shall continue for such period of time as is necessary to evaluate the extent and nature of each water right for which a notice of claim has been filed. The Director may conduct any fact finding hearing necessary for a full and adequate disclosure of the facts.

Idaho Code § 42-1411 directed the Department to determine the various elements of each water right claimed in a general stream adjudication. Thus, prior to the

amendments of the SRBA statutes in 1994, the Idaho legislature, and presumably the Court and other parties, properly would have deemed the Department to be competent to conduct such examinations and to make such recommendations. Even following the 1994 amendments, the Director's role is that of

an independent expert and technical assistant to assure that claims to water rights acquired under state law are accurately reported in accordance with the procedures of chapter 14, title 42, Idaho Code. The Director shall make recommendations as to the extent of beneficial use and administration of each water right under state law and may use uniform parameters for quantification of beneficial use recommended for rights within climatic regions of the state.

Idaho Code § 42-1401B. Upon filing with the Court, the Director's Report becomes part of the record and constitutes prima facie evidence of the nature and extent of the water rights, which must be rebutted by any party objecting thereto. The unobjected to portion of the report shall be decreed as reported. Idaho Code § 42-1411.

Certainly, if the Department's recommendations are prima facie evidence upon which the Court is entitled to rely and enter a decree, then a party to the SRBA such as Cranney may rely upon them as well. Cranney has reviewed the claims, the recommendations of those claims contained in the Director's Report, and relevant portions of the Director's files concerning the its investigation. Cranney filed its Motion and proposed responses based upon that review and reliance on the Director's recommendations.

C. Cranney's Interests May Be Impaired by the Outcome of the Subcases.

Cranney is a party to the SRBA, and subject to this court's jurisdiction, because its water rights are diverted within the boundaries of the Snake River Basin. Moreover, Cranney's water rights are diverted from an area that has been determined

to be a common source of supply with that of the Claimants'. Cranney previously has been notified by the Director that its rights may be curtailed, or that Cranney may have to provide mitigation, to satisfy a call made by water right holders in the Hagerman Valley, such as the Claimants. See Pg. 105, l. 21 to Pg. 107, l. 20; Pg. 163, l. 3 to l. 23 to Mike Cranney Deposition attached to Affidavit of Michael C. Creamer. As such, Cranney has a substantial interest in seeing that the Claimants' rights are properly decreed.

D. The Legal Issues Raised by these Subcases, and by Cranney's Proposed Responses are Significant to the SRBA as a whole, and to Claims by other members of the HWRO organization.

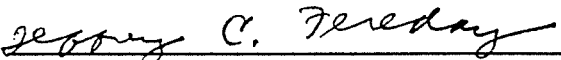
The Claimants' Claims and Objections, and Cranney's proposed Responses, raise legal issues that are significant to all parties to the SRBA. Inflated claims must not simply be rubber-stamped in the adjudication simply because the expert who reviewed the claims and was prepared to defend its recommendations as a party now has been removed as a party. Whether the SRBA court must decree rights today as they were decreed many years ago is an issue that will impact claimants in every subbasin. Whether a particular right holder may demand delivery of water *for irrigation* during the non-growing season is an issue critical to every junior right holder. Whether the standards and methodologies used in these Subcases by the Court's expert and advisor are proper must be determined now, before other Director's Reports are issued. Whether it is a taking of private property for the report to recommend fewer acres, or a smaller quantity or period of use than claimed, is similarly important to every SRBA claimant. Whether, on the facts, any of the Claimants' lands could "reasonably" require five and one-half inches of water per

irrigated acre, and the kind of proof necessary to establish such claims, are issues deeply affecting every pending claim in the SRBA.

These issues cannot, and should not, be left to the Court to sort out by itself, without the benefit of a case-in-controversy between adverse parties. Cranney's property rights are at stake, and due process entitles Cranney to frame the issues and develop the facts for the Court in the context of an adversarial proceeding. Cranney must be admitted as a full party to these Subcases. As the Court knows, the Claimants' counsel previously has announced that, with the Department no longer involved, rights facing no response or objection should be granted a default judgment. Such a result would injure claimants like Cranney and call into question the integrity of the result in the entire SRBA. The Court should allow Cranney into these Subcases as a full party.

Respectfully submitted this 20th day of November, 1995.

GIVENS PURSLEY & HUNTLEY LLP


Jeffrey C. Fereday
Michael C. Creamer
Attorneys for Cranney Bros.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of November, 1995, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Jeffrey C. Friday